UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 21

THE VINTAGE CLUB,	Case No. 21-RC-073752			
Respondent – Employer, and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 1184, AFL-CIO, Petitioner – Union.	PETITIONER'S OPPOSITION TO RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL FROM REGIONAL DIRECTOR'S ORDER DENYING EMPLOYER'S MOTION TO DISMISS PETITION [OBJECTIONS]			

Petitioner Laborers' International Union of North America, Local Union No. 1184, AFL-CIO, hereby opposes the request of Respondent The Vintage Club for Special Permission to Appeal and Appeal from the Regional Director's Order Denying Employer's Motion to Dismiss Petition.

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I. AT THIS STAGE, OBJECTIONS MAY NOT BE SUMMARILY DISMISSED BY VIRTUE OF A MOTION FROM THE EMPLOYER

The Employer cites, generally, Section 102.69 of the National Labor Relations Board's Rules and Regulations as the authority for its motion. However, this section does not support or provide for any authority for the Employer to file a motion to dismiss at this early stage of the case. Pursuant to Section 102.69, Petitioner must file its objections within 7 days of the date on which the tally of ballots has been prepared. Section 102.69 provides for "filing objections by facsimile pursuant to § 102.114(f)."

Here, the election took place on March 9, 2012, and the Union timely submitted its objection by fax on March 16, 2012, and the Regional Office's fax machine timely received the Union's objections on March 16, 2012. Attachment A is a true and correct copy of the fax cover sheet to the Union's objections which includes a transaction report, verifying the successful transmission of the Union's objections to the Regional Office's fax number of (213) 894-2778, at 2:51 p.m., on March 16, 2012. Attachment B is a true and correct copy of the Union's objections which the Regional Office's fax machine printed out, which lists the date, March 16, and time, 2:52 p.m., that the transmission was accomplished and received by the Regional Office's fax machine. The Regional Director, in her Order Denying Employer's Motion to Dismiss Petition, confirms that the "Regional Office

received Petitioner's objections on March 16." Thus, there is no dispute that the transmission was accomplished and timely received by the Regional Office's fax machine on March 16, 2012.

Respondent contends that the Regional Office did not receive the Union's objections because the Regional Office did not replace the toner in its fax machine until March 20, 2012, and the Union's objections did not print out of the fax machine until March 20 when the Regional Office replaced the toner. However, even though the Regional Office's fax machine may have been out of toner, this did not affect transmission of the data—i.e., the Union's objections—to the Regional Office's fax machine. The data was transmitted regardless of whether there was toner in the fax machine; once the toner is replaced, the fax machine simply prints out the data that has already been transmitted and received by the Regional Office's fax machine. This is similar to circumstances where a party timely e-files a document with the Board and the document is received by the Board's e-filing system, but the Board agent is unable to print the e-filed document because the agent's printer is out of toner and the document is not printed until the toner is changed, which occurs after the applicable filing period. The fact that the Board agent's printer was out of toner would not nullify the timely filing and receipt of the e-filed document by the Board's e-filing system.

In support of its contention, Respondent cites the provision of Section 102.114(f) which provides that a "failure to timely file or serve a document will not be excused on the basis of a claim that <u>transmission</u> could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason" (emphasis added) and contends that the phrase "unavailable for any other reason" applies to the lack of toner in a fax machine. However, this provision expressly applies to circumstances that affect the <u>transmission</u> of the Union's objections by facsimile, such as the receiving fax machine being "off-line or busy," and is not applicable in this instance. In her Order Denying Employer's Motion to Dismiss Petition, the Regional Director confirms that "Region 21's fax machine was on-line, not busy, and available to all parties."

The Regional Director has accepted the objections as timely and provided timely notice to the Employer. Given that the Regional Director has proof of the transmission and receipt by the Regional Office's fax machine by no later than March 16, 2012, at 2:52 p.m., and has exercised her discretion to accept the objections and thereafter, provided the Union with an opportunity to provide evidence in support of the charges, the Employer's special request to appeal and appeal should be denied.

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II. AUTHORITY CITED BY THE EMPLOYER DOES NOT APPLY

In support of its argument, the Employer contends that the Union's objections may be dismissed under the authority of South Atlantic Trucking, Inc., 327 NLRB 534 (1999). This case is distinguishable in that it does not relate to the filing of objections, but rather, the filing of an answer. Generally, at the time of the decision in 1999, answers to complaints could not be fax filed. Id. Additionally, in South Atlantic, there was no indication that the Respondent had transmitted the answer and produced, in support of its position, a verifiable confirmation of the transmission. To the contrary, it is only stated in the Board's decision that the Respondent "contends that it unsuccessfully attempted to fax its answer" but that the Respondent "was unable to complete the fax . . . because the Region's fax machine was apparently turned off after 5 p.m." <u>Id</u>. Here, unlike South Atlantic, there is evidence that the document was successfully transmitted. Furthermore, South Atlantic is distinguishable because transmission of the facsimile was not timely effected because the Region's fax machine was turned off; here, there is no dispute that transmission was timely accomplished.

Additionally, and most conspicuously, the Board in <u>South Atlantic</u> went on to address, extensively at p. 535, whether the Employer had provided sufficient cause to explain the failure to file a timely answer and its failure to address the allegations at issue until service of a Notice to Show Cause. The affirmation of the

Board in that case was predicated on the Employer's extreme neglect in failing to answer charges in a timely manner after extensive notice of the proceedings had already been provided. Perhaps knowing that this discussion would be contradictory to its goal of having the objections dismissed, the Employer completely ignores this section of the decision and argues, without express authority and even in contradiction of South Atlantic, that the lack of toner is grounds to certify the election results.

There simply is no authority for the result sought by the Employer and no procedural basis by which summary dismissal of the objections may be obtained at this time. For the reasons stated herein, the Employer's special request to appeal and appeal should be denied, and the Union's objections set for hearing.

DATED: April 17, 2011

CARLOS R. PEREZ and WILLIAM Y. SHEH, Members of REICH, ADELL & CVITAN A Professional Law Corporation

Bv:

WILLIAM Y. SHEH Attorneys for Laborers' International Union of North America, Local Union No. 1184, AFL-CIO

Attachment A

ANSACTION REPOR

MAR/16/2012/FRI 02:52 PM

FAX(TX)

T. W.V.	1 W)						
#	DATE	START T.	RECEIVER	COM.TIME	PAGE	TYPE/NOTE	FILE
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REICH, ADELL & CVITAN

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PLEASE DELIVER TO:

Olivia Garcia

FAX NUMBER:

(213) 894-2778

FROM:

Carlos R. Perez

REGARDING:

The Vintage Country Club

21-RC-073752

COMMENT

REICH, ADELL & CVITAN

A Professional Law Corporation 3550 Wilshire Blvd., Suite 2000 Los Angeles, California 90010-2421

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  6
        ., North America, Local Union No. 2184, AFL-CIO
                             UNITED STATES OF AMERICA
                    BEFORE THE NATIONAL LABOR RELATIONS BOARD
  9
                                     REGION 21
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     THE VINTAGE COUNTRY CLUB,
                                           CASE NO. 21-RC-073752
 12
               Employer,
                                          OBJECTIONS TO CONDUCT AFFECTING
 13
                                          THE RESULTS OF THE ELECTION ON
                                          BEHALF OF UNION
         and
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    LABORERS' INTERNATIONAL UNION OF
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    NORTH AMERICA, LOCAL UNION NO.
    1184, AFL-CIO,
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              Union.
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         Pursuant to Section 102.69 of the National Labor Relations
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    Board's Rules and Regulations, as amended, Petitioner Laborers'
    International Union of North America, Local Union No. 1184, AFL-CIO
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    ("Union"), hereby objects to conduct affecting the results of the
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    election in the above-captioned matter for the following reasons:
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                                   OBJECTIONS
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The Vintage Country Club ("Employer"), by its officers, managers, supervisors, agents and/or supporters, interfered with the

#198644 v1 - Final version Objections to Conduct of Election

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fair operation of the election process and destroyed the necessary laboratory conditions by, during the election, segregating employees in the voting unit by area and directing these employees to the voting site.

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The Employer, by its officers, managers, supervisors, agents and/or supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by, during the period immediately prior to and during the election, assigning various supervisors and/or agents to the election site/polling place to watch the employees as they appeared at the election site to cast. their ballots.

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The Employer, by its officers, managers, supervisors, agents and/or supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by, during the election and in a hostile manner, telling employees in the voting unit who were known Union supporters and who were at or near the election site or who were passing by on their way to the polls to cast their ballots, that if they wanted the Union, they should go and work for the El Dorado Country Club, which is a union country club, instead of the Employer.

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The Employer, by its officers, managers, supervisors, agents and/or supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by denying the Union and its organizers access to the election site/polling place during the pre-election meeting as a show of force or power by

the Employer in full view of the election observers and employees in the voting unit while the observers and employees were assembling to vote.

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5. By the above and other conduct described in paragraphs 1-4, the Employer has interfered with and coerced eligible voters with regard to the exercise of their Section 7 rights under the National Labor Relations Act and destroyed the atmosphere necessary to conduct a fair election. The above coercive acts and other conduct taking place during the critical pre-election and actual voting period were sufficient to unlawfully affect the results of the election.

WHEREFORE, for all the foregoing and any other reasons recognized by law, the Union respectfully requests that the Regional Director review and investigate the aforementioned conduct and set aside the results of the election or, in the alternative, order a hearing thereon.

Date: March 16, 2012

CARLOS R. PEREZ, Member of REICH, ADELL & CVITAN A Professional Law Corporation

34: Canlos R. Pers

Attorneys for Laborers' International Union of North America, Local Union No. 1184, AFL-CIO

PEOOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed by Reich, Adell, Crost & Cvitan (the firm) in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 3550 Wilshire Boulevard, Suite 2000, Los Angeles, CA 90010.

On April 17, 2012, I served the foregoing document described as UNION'S POST-HEARING BRIEF on the interested parties in this action by placing true copies enclosed in a sealed envelope addressed as follows:

Alvaro Medina, Board Agent National Labor Relations Board Region 21 888 So. Figueroa Street, 9th Floor Los Angeles, CA 90017-5449 FAX: (213) 894-2778 Email: alvaro.medina@nlrb.gov

Olivia Garcia, Regional Director National Labor Relations Board Region 21 888 S. Figueroa Street, 9th Floor Los Angeles, CA 90017-5449

Fax: (213) 894-2778

Email: NLRBRegion21@nlrb.gov

The Vintage Club c/o John A. Ontiveros JACKSON LEWIS LLP 225 West Broadway, Suite 200 San Diego, CA 92101 FAX: (619) 573-4901 Email: OntiverosJ@jacksonlewis.com

The Vintage Club **(VIA UPS OVERNIGHT)** c/o Tom Murphy, General Manager 75-011 Vintage Drive West Indian Wells, CA 92210

- (By Mail) I am familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, in the ordinary course of business mail is deposited with the U.S. Postal Service on the same day as it is dated, with postage fully prepaid at Los Angeles, California.
- X (BY OVERNIGHT DELIVERY) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the address above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- X (BY EMAIL) I transmitted via electronic notification the documents(s) listed above to the email addresses set for th above on this date.
- (BY FACSIMILE TRANSMISSION) I caused _ the original or X a true and correct copy of the foregoing document to be transmitted to each of the parties on the service list at the facsimile machine telephone number as last given by that person on any document which he or she has filed in this action and served upon this office.

Executed on April 17, 2012 at Los Angeles, California.

Chen Winborne